(23,107)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 218.

GEORGE E. PRIEST, MELVIN W. QUICK, AND CHARLES M. BENJAMIN, APPELLANTS,

vs.

THE BOARD OF TRUSTEES OF THE TOWN OF LAS VEGAS, IN THE COUNTY OF SAN MIGUEL, NEW MEXICO.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

STATEMENT OF THE CASE

This is a proceeding by petition for a mandamus directed to the Board of Trustees of the Town of Las Vegas, commanding them to make execute and deliver to Relators (Appellants) a deed of conveyance for a tract of land, situated in the County of San Miguel, Territory of New Mexico, within the boundaries of the Las Vegas Land Grant. The Petition was filed in the District Court of San Miguel County, New Mexico, September 4, 1906, and avers that Relators between the years 1888 and 1894 acquired the said land by purchase from its then owners and occupants and afterwards brought suit to quiet title thereto, and said title by a decree of the District Court of San Miguel County of September 15, 1894, was established in Relators as an estate in fee simple, absolute against any and all claims of any person whatsoever. (Finding of Fact 6. Trans. p. 104). That by virtue of an act of the Legislative Assembly of the Territory of New Mexico, entitled "An Act Providing for the Management of the Las Vegas Grant and for other Purposes," approved March 12, 1903, it was made the duty of the Board of Trustees of the Las Vegas Grant "To make, execute and deliver deeds of conveyance to any and all persons, who hold a title to any of the lands of the Grant which became or was perfect, or entitled them to the possession thereof at the time of the acquisition of New Mexico under the Treaty of Guadalupe Hidalgo, *or at any other time subsequent thereto.*" (Finding of Fact 9. Trans. p. 107). That Relators accordingly made application to said Trustees for a deed to the land con-

firmed to them by Decree of Court, who declined to issue it, wherefore they prayed for a writ of Mandamus commanding them to do so. (A copy of decree of September 15, 1894, was attached to said petition as an exhibit.)

Upon filing this petition an order to show cause was issued against Respondents, who as a return thereto filed an "answer to Relators' petition" and a so-called "counter claim and as an additional defense."

The Answer (Trans. p. 9.) after denying the title of Relators, and the language and effect of the decree of September 15, 1894, gives a detailed recital of the action taken respecting the Las Vegas Grant by the Government Officials and the various groups of Claimants from 1858 to 1902 when Respondents were appointed Trustees to manage it. Thus, allusion is made to the investigation of the Grant by the Surveyor General of New Mexico in 1858 and the forwarding of his report and findings with all documents pertaining thereto to the Commissioner of the General Land Office and its transfer thereafter to Congress and Confirmation June 21, 1860; the instructions issued by the Land Department July 26, 1860, to the Surveyor General directing him to make a survey of the Grant to determine its area so that the Baca Claimants might be given a certificate of the area they were to select in five separate parcels, the two areas to be equal; the Pelham Survey of 1861, approved by the Surveyor General, but not by the Commissioner of the General Land Office or Secretary of the Interior, fixing the area at 496,446.96 acres, for which area a certificate was issued to the Baca Claimants and locations thereunder made and approved by the proper officers of the Government; the issuance thereafter of Territorial Maps by the Government with the Grant located upon them, according to said survey as a confirmed Grant; the recommendation on March 22, 1887, of George W. Julian then Surveyor General that a re-survey of the Grant be made, because, in his opinion, it could not legitimately embrace more than 20,000 acres and the ordering of such re-survey November 5, 1887, by the Commissioner of the General Land Office, which survey was begun but never completed; the review February 1, 1890, of the Julian recommendations by Edwards S. Hobart, then Surveyor General, and his disapproval of them and recommendation that a patent issue to the Town of Las Vegas, according to the Pelham Survey of 1861; the action thereupon on December 5, 1891, of John W. Noble, the then Secretary of the Interior, in ordering a re-survey of the Grant in accordance with the recommendations of Julian; the petition of certain persons claiming to act for and on behalf of the Town of Las Vegas for a review and reversal of the said ruling of the Department of the Interior and the denial of same on May

16, 1894, by Hoke Smith, then Secretary of the Interior, and his order that a patent issue in accordance with the decision of Noble; the action on December 17, 1898, of Thos. E. Ryan, then acting Secretary of the Interior, in revoking and setting aside the decision and order of Noble and directing the Commissioner of the General Land Office to take such action as might be necessary for the issuance of a patent to the Town of Las Vegas for the full quantity of land embraced within the boundaries set forth in the original petition for the Grant; the Petition of P. Milheiser, for himself and other persons claiming to be the Grantees of the Las Vegas Grant filed with the Commissioner of the General Land Office in 1890, asking that a patent to the Grant be issued to them or their predecessors in interest and how from that time continuously to January 6, 1902, litigation was being instituted and carried on before the Secretary of the Interior and Commissioner of the General Land Office and the District and Supreme Courts of the District of Columbia, and the Supreme Court of the United States, between the various claimants of the Grant, as to who were the real parties in interest and to whom the patent should issue and what area it should embrace. (January 6, 1902, is the date of the decision of this Court in the case of Maese vs Herman, holding that the patent should issue in accordance with the act of Congress confirming the Grant to the "Town of Las Vegas." Maese vs. Herman 183 U. S. 572.)

Then follow averments that in 1889 and 1900 the Commissioners of the General Land Office caused a re-survey of the Grant to be made by one Frank M. Johnson and the area determined to be 431,653.65 acres upon which on June 27, 1903, a patent issued; that the exterior lines of each of the several surveys were different and that at the time of the institution and prosecution of the suit to quiet title, Plaintiffs in that suit (Relators and Appellants here) had knowledge of all of the facts hereinbefore stated. Paragraphs 22 and 23 of this Answer (Trans. p. 13.) we give in full because of their importance in determining the issue attempted to be raised.

"22. That said Town of Las Vegas, either at the date of said confirmation or at any time subsequent thereto, had no legal representative upon whom legal process could be served until the . . . . . day of . . . . . , 1902, when the Board of Trustees, Respondents herein was appointed." (Finding of Fact 5, Trans. p. 103.)

"23. That neither Respondents nor said Town of Las Vegas was a party to said suit to quiet title in the petition in this action set out, and in said suit no process was issued against, nor was any served upon said Town of Las Vegas or the Respondents herein."

The Answer then concludes with a disclaimer on the part of Respondents of any personal interest in the lands in controversy, being merely, as Trustee, vested with its management and control. Three exhibits are attached, covering pages 14 to 52 inclusive of the transcript.

Relators moved to strike this answer from the files, because it contained irrelevant and redundant matter, and was an attempt to impeach the judgment and decree quieting title, which is conclusive upon Respondents in a collateral proceeding, such as mandamus (Trans. p. 65.). This the Court overruled (Trans. p. 66.). They then demurred upon the same grounds (Trans. p. 67.). This was also overruled (Trans. p. 68.).

The so-called counter-claim and additional defense of Respondents (Trans. p. 53.), is in the nature of a cross bill in equity to remove from the lands in question the cloud of Relators' title and prays that the decree in favor of Relators be vacated and the title quieted in Respondents. With the single exception of the commencement and conclusion this pleading contains as grounds for this relief the same allegations of fact as the answer and in the same language. This, too, Relators moved to strike out (Trans. p. 72.) and being overruled (Trans. p. 73.) demurred (Trans. p. 73.) and were again overruled (Trans. p. 75.) the grounds in each being the same; viz. that the pleading constituted no defense and no lawful return and was not permissible as a defense by way of cross bill or counter-claim to a mandamus proceeding. Exceptions were taken to each of the above four rulings of the Court and assigned as error on appeal to the Supreme Court of the State (Trans. p. 89. Error 1. 2- 3. 4.) but not passed upon there and such failure is assigned as error here (Trans. p. 111. Error 9.)

Relators then filed without objection a reply to the answer (Trans. p. 68) and an answer to the counter-claim (Trans. p. 75.) of Respondents, in each of which they re-affirmed the character of their title as stated in their petition; deny that the Pelham Survey was not approved by the Commissioner of the General Land Office and Secretary of the Interior; deny that Milheiser and his associates represented the Town of Las Vegas, but assert they claimed to be the successors and assigns of the original Grantees and distributees prior to the Treaty of Cession, and that with the exception of the Julian Survey and efforts made to defeat it, all the litigation with reference to the Grant, turned upon the question as to who were Grantees and proper claimants under the Act of Confirmation; some contending that all of the inhabitants of the community called the Town of Las Vegas, were meant; others that it was the original petitioners for the Grant and those who had receiv-

ed allotments down to the date of the Treaty, and others still that the original petitioners alone were intended.

On the subject of their knowledge of proceedings affecting the Grant at the time of the institution of their suit to quiet title, Relators admit they knew of the procceedings before the Surveyor General, the Act of Confirmation and the Pelham Survey, but because the Confirmee designated as the Town of Las Vegas had no legal or corporate existence, they could not know it or that such an entity either owned or claimed the Grant. However, they did know that the inhabitants of the unincorporated community of Las Vegas were the owners and claimants of interests in the Grant, but who and how many such there were or their where-abouts was unknown, both to Relators and their representatives. As to paragraph 22, they say:

"12. Replying to paragraph 22 of said answer and return, Relators admit the same and aver further that the said Town of Las Vegas was not an incorporated Town, either at the date of the said Confirmation, or at any time subsequent thereto. They deny, however, that because of this legal process could not be served by publication under the Statutes of New Mexico against the inhabitants of the said Town of Las Vegas, the real parties in interest and beneficiaries under the said Act of Confirmation."

Paragraph 23 is categorically denied.

Upon this state of the pleadings the case went to trial and on February 26, 1910, judgment was rendered dismissing the petition of Relators, because the Statute of Limitations did not begin to run against the Las Vegas Grant until after the passage of the Act of the Legislative Assembly of the Territory of New Mexico of 1903, and the appointment of a Board of Trustees by the Court to manage and control it and the possession of Relators and their predecessors in title for the period of ten years prior thereto could not ripen into title against Respondents. (Trans. p. 108, Finding of Fact 12.)

From this judgment Relators appealed to the Supreme Court of the State, assigning for further error the findings that the Statute of Limitations did not begin to run until after the appointment of Trustees; that possession of ten years prior thereto could not ripen into title and that the decree of Sep. 15, 1894, was not binding upon Respondents (Trans. p. 90. Errors 5.6.7.).

The Supreme Court, upon a hearing, affirmed the judgment of the Court below "For reasons stated in the opinion of the Court on file." (Trans. p. 92.). From this judgment the case is brought by appeal into this Court by Relators (Appellants.)

ERRORS RELIED UPON.

1. The Court erred in holding that the District Court of San Miguel County in the suit to quiet title to the premises in question, had no jurisdiction of the Town of Las Vegas through service of publication upon "All the unknown claimants of interests in the premises adverse to complainants," and that in consequence the decree of September 15, 1894, was not binding upon Respondents and Appellees here.

2. The court erred in setting aside and ignoring in a collateral proceeding upon extraneous evidence the solemn adjudication in the decree of September 15, 1894, by a Court of record, of its jurisdiction of all parties known and unknown so as to enable it to quiet title against the world.

3. The Court erred in holding that the specific findings of the District Court of San Miguel County as to its jurisdiction of all parties, in the decree of September 15, 1894, quieting title to the premises in question in Relators and appellants was less conclusive in this collateral proceeding than, to use the language of the opinion, "All the findings upon which that decree proceeds," whether properly made or not.

5. The Court erred in holding that because the Las Vegas Grant was, by Act of Congress, confirmed to the Town of Las Vegas, which, at the time of the institution of the suit to quiet title and the rendition of the decree of September 15, 1894, therein, is conceded to have had no corporate existence and could not therefore be personally served with process, was nevertheless a "known owner," in the sense that the words known and unknown are used when applied to claimants of property, and should have been made a party to such suit by name and served with notice by publication, not as an "unknown owner" but as a defendant "so situated that process could not otherwise be served upon it."

6. The Court erred in holding that the citation by publication of "all unknown claimants of interest in the premises adverse to complainants" did not operate to render the adjudication of September 15, 1894, binding upon "the Board of Trustees of the Town of Las Vegas," notwithstanding that it brought before the Court all the beneficiaries of the Las Vegas Grant, with whom the Board of Trustees is in privity.

7. The Court erred in not holding that the decree of September 15, 1894, was, in all respects, conclusive and binding upon it and all parties to this proceeding, and could neither be impeached nor contradicted by extraneous evidence in this collateral proceeding.

8. The Court erred in deciding the case upon grounds not properly raised by the pleadings and different from that upon

which the case was tried and decided in the trial Court and argued in the Supreme Court.

9. The Court erred in not passing upon Appellants' exceptions to the rulings of the Court below, upon the motion to strike out parts of Respondents' answer and so called counterclaim and additional defense and the demurrers thereto.

10. The Court erred in not reversing the judgment of the Court below and remanding the case with instructions that a writ of Mandamus issue as prayed for.

ARGUMENT.

Preliminary to taking up the consideration of the points of law and fact, it should be remarked that no attack is made by Appellees upon the petition for Mandamus. The right to the relief demanded, the correctness of this mode of procedure to obtain it and its sufficiency for that purpose are conceded. The view of the Supreme Court as to it, is therefore *obiter dictum* (Trans. p. 116.)

Likewise no fraud is charged in obtaining the decree of September 15, 1894, quieting title in Appellants.

Nor is the service by publication in the suit in which such decree was rendered, as to procedure, regularity or sufficiency challenged. It is admitted to be ample to render the decree binding upon Appellees had it been possible upon their theory to obtain jurisdiction of them through the service of legal process.

This being a proceeding by Mandamus to have the title decreed to Appellants authenticated by a deed of conveyance, is obviously a collateral proceeding akin to enforcing satisfaction of a judgment and Appellees are therefore concluded by the decree.

Vanfleet Collateral Attack Sec. 3. Supervisors vs United States 4 Wall. 435. (444). The Mayor vs Lord 9 Wall. 409. (413). The Supervisors vs Durant 9 Wall. 415 (417). Franklin County vs German Savings Bank. 142 U. S. 93. (98—101).

And where, as here, the judgment quieting title discloses the fact that the matter of jurisdiction of the parties has been considered and determined by the Court, such determination is as conclusive upon the parties in a collateral proceeding as any adjudication of the Court can be.

Freeman on Judgments 3rd Ed. Sec. 130, 23 Cyc. 1084. Foster et al vs Givens 67 Fed. 684. (690—691). Scudder et al vs Cox et al 80 S. W. 872. Brawley et al vs Ranney 67 Mo. 280. Reedy et al vs Camfield et al 42 N. E. 833. Cincinnatti S. & C. R. Co. vs Village of Belle Centre 27 N. E. 464. Winemiller vs

In Re Harper 133 Fed. 970.

Laughlin et al 38 N. E. 111. McCauley vs Fulton 44 Cal. 355, Bickerdike vs Allen 41 N. E. 740.

The above propositions of law are so well established that only a citation of the more important authorities is necessary. As we view this case they are decisive of every phase of it.

We will consider the points raised in the order in which they appear in the Supreme Court's Opinion.

STATUTE OF LIMITATIONS.

This is the only issue raised by the pleadings, as we will hereafter show, and the one upon which the case was tried and determined by the trial Court. In its opinion (Trans. p. 117) the Supreme Court says on the subject, that much testimony produced at the trial and much that was argued before it was immaterial, because it related to the running of the Statute of Limitations, which under the decree of 1894 had been determined to the contrary of Appellees contention. (Finding of Fact 6, Trans. p. 104). Then without further discussion it dismisses the subject entirely in this language;

"If however, the Court had jurisdiction, as against defendants to render the decree of 1894, all findings upon which that decree proceeds are likewise conclusive against it and it avails nothing to inquire, as did the Trial Court, into whether such findings were as a matter of fact properly made."

This is a clear recognition of the principles of law we have announced and a correct application of them, we think, to that portion of the decree. With nothing more before it, this should have ended the case.

SERVICE BY PUBLICATION.

But evidently bent upon an affirmance of the judgment before it on some ground it then seizes upon the service made by publication and discusses the question of jurisdiction of defendants obtained through it, in the proceeding to quiet title, when as stated by us at the outset, this service was in no manner assailed. After a somewhat extensive argument more technical than logical, covering the larger part of the opinion, it reaches the conclusion that the service by publication was defective, in that it proceeded against the Town of Las Vegas as an "Unknown Claimant," when in fact it was "Known" at the time the suit to quiet title was instituted, and so finds. In doing this, it disregards the fact that the decree of 1894 adjudicates the jurisdiction of all the defendants both known and unknown and the appropriateness, legality, and sufficiency of the service to acquire such jurisdiction, in these words;

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"Second. That all the defendants to this cause, both known and unknown, and all persons who may have or claim any interest or title to the lands and premises set out and described, in the bill of complaint, and hereinafter described, have been brought before the Court by the proper process and are each and all properly made defendants to said bill of complaint, and that the service upon each and all of the parties defendant in said cause is in all respects and particulars in conformity to the law, and that the Court has jurisdiction of each and all of the said defendants, whether known or unknown and has jurisdiction of the subject matter of this suit."

This finding and adjudication is as full and positive on the subject of which it treats as that respecting the Statute of Limitations which the Court says cannot be inquired into. We will concede that if the Court had jurisdiction of defendants, all findings upon which the decree proceeds are conclusive against them. But this concession is no proof that the Court may not determine the question of jurisdiction of parties in the same manner as it determines other facts in issue in the case and make findings as to such jurisdiction and that these findings when so made are not as binding and conclusive upon the Court in a collateral proceeding, as, to use the language of the opinion "All findings upon which that decree proceeds." If we are correct in this, the Supreme Court was in no better position to take up and consider the matter of the service on defendants than was the Lower Court to consider the matter of the Statute of Limitations.

We know of no distinction between findings as to jurisdiction and findings as to other matters in issue in the suit, and the Court in its opinion refers to none. The law which here bars the consideration of the one, must necessarily bar the consideration of the other. We submit therefore that the question of the jurisdiction of the defendants through service by publication, having been adjudicated in the decree of 1894 was likewise conclusive upon the Court and not subject to attack in this collateral proceeding, whether as matter of fact it was in issue or not.

Thompson vs. Thompson 226 U. S. 552.

SERVICE BY PUBLICATION NOT AN ISSUE.

The further objection to its consideration is the fact that it was not an issue. The pleadings in Mandamus raise the sole issue of the date at which after the Act of Confirmation of June 21, 1860, the Statute of Limitations of New México began to run. Appellees deny the ability of Appellants to acquire title to land of the Grant by adverse possession for the statutory period, at any time between 1860 and 1902 the date of

their appointment. To support such denial, allegations are made to demonstrate; first, that the status of the Grant Title was such during this period that no rights by limitation could accrue, and, second, that the status of the Town was such that no rights by limitation could be adjudicated against it, because of the impossibility of serving it with *legal process*. When then the Court dismissed Appellees contention as to the Statute of Limitations there was nothing left, it would seem, but to reverse the judgment of the Lower Court and remand it with instructions to grant the writ. It could not, as was done, go outside of the record and of its own motion raise an issue as to the sufficiency of the service upon the defendants in the suit to quiet title, when under the pleadings such issue is in express language excluded by Appellees from the Court's consideration. (Finding of Facts 5, Trans. p. 103). Service with *legal process* embraces service in any and every manner provided by law, whether personal or by publication. When then Appellees declare that during the period above mentioned the Town of Las Vegas could not be served with legal process, they exclude all service and take from the Court the consideration under such declaration of any service by publication, whether perfect or otherwise.

But it will doubtless be claimed that paragraph 23 of both the answer and return and counter-claim disproves this. (Trans. p. 13, 57.) Does it do so? No. 22 which we have been considering and No. 23 read together, stand in the relation to each other of cause and effect. Because no legal process could be served upon the Town it was not made a party and no process was issued against or served upon it. Reading them as separate and distinct statements of facts the former excuses the doing of the things complained of in the latter and leaves no issue for determination. Viewed in any light the conclusion above reached seems inevitable.

REASONING AS TO KNOWN OWNERS.

The fallacy of the Court's reasoning as to the Town of Las Vegas being a known owner and claimant of the Grant in 1894, lies in the fact that it makes knowledge by Appellants of the mention of the Town, as Grantee, in the Act of Confirmation of 1860 proof of knowledge of the existence of the Town at that date, as a legal entity, capable of claiming, owning and controlling the Grant and of suing and being sued respecting it and then by some undisclosed line of presumptions or deductions or both bringing knowledge of such existence by Appellants down to 1894. With nothing but the single fact of Appellants "conceded knowledge" of the Act of Confirmation, how

else, unless it was jumped at, could so remarkable a conclusion be reached. Nowhere in the entire record is there another statement to support it. To the contrary there is the most abundant denial of it. Appellees declare what Appellants admit, that the Town of Las Vegas as a legal or corporate entity never did exist under our sovereignty and likewise no representative of it, upon whom legal process could be served until the appointment of Trustees in 1902. Yet notwithstanding the record is undisputed that the status of the Town of Las Vegas was such in 1894 that it was impossible to *know* it as either claimant or owner, the Court contradicts it and finds to the contrary. As to service upon the Town of Las Vegas in 1894 Appellees declare that it could not be made by *legal process*. The Court again contradicts the record and says it could be made by publication as a defendant "so situated that process could not otherwise be served upon it." The Court's denouncement of the evils of "published summons," which its reasoning would lead us to suppose it intended to avoid, is appropriate here. (Trans. p. 19) Contra Hahn vs. Kelly 34 Cal. 391. (410). Our statute authorizing the quieting of title to real property makes no provision for service on the dead. As to them it says "The unknown heirs of any deceased person whom plaintiff alleges in his bill of complaint in his lifetime made claim adverse to the estate of plaintiff."

The truth is that the Town of Las Vegas is a mere name, a shadow without substance, the ghost of a departed Mexican authority. It has stalked into Courts, Departments of the Government, everywhere in fact where rights of the inhabitants to all or a portion of the lands of the Grant were involved, always and everywhere to confuse, complicate, defeat rights, never to establish them. In the Department of the Interior this ghost was laid by the Secretary in this language: "That the people composing the Town were understood to be the confirmees is shown by various annual reports to your predecessors, where, in giving a list of private land claims, under the heading "Confirmee" or "Present Claimants" the Phrase "Inhabitants of the Town" is used (Trans. p. 52.). Likewise in this Court in the case of Maese vs Herman (183 U. S. 572.) where it is said; "In the reports of the General Land Office subsequently made, the tract was named "Town of Las Vegas" and the claimants the "Inhabitants of the Town." Also, "The Town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States."

These views but follow the history of the Grant which Appellees have given. Inhabitants of the Town petitioned for an investigation of the title to the Grant and asked its confirmation

to themselves as claimants and legal owners. Inhabitants of the Town petitioned for a review and reversal of the rulings of the Secretary of the Interior, ordering a resurvey of the Grant Inhabitants of the Town opposed before the Commissioner of the General Land Office and in the District and Supreme Courts of the District of Columbia the issuing of a patent to some thirty individuals claiming to be the true Grantees. Indeed all along down to the appointment of Appellees as Trustees the people of the Town were active in defense of their rights and found no difficulty in asserting them. The "Town of Las Vegas," which the Supreme Court of New Mexico calls the "true owner," from whom Appellants "wrested the title," did nothing. If a claimant, when and where in all the history of the Grant did it ever assert a claim or prosecute one. Because of its admitted status it was powerless to do either. It was of no more importance as a defendant in the suit to quiet title than the inmate of a graveyard, who also might have been summoned by the same method. Insert its name in a proceeding and serve it as the Court directs and what is gained? Leave it out and what is lost? If it might be inquired into now, is there any merit in the Court's claim?

The Town of Las Vegas, had it then existed, would have been simply a Trustee as Appellees are now, a representive of the people of the Town, convenient to have, but not necessary. The Inhabitants were the persons materially interested and could best represent their interest and if they were before the Court in 1892, in the suit to quite title, the decree therein rendered bound them. The Court trying that case is to be presumed to have had full knowledge of everyting affecting the Grant, and having determined that all defendants, known and unknown, had been brought before the Court by "proper process" and that "Service upon each and all is in all respects and particulars in conformity to the law," such determination is conclusive in this collateral proceeding.

INHABITANTS AND TRUSTEES PRIVIES.

The inhabitants of the Town of Las Vegas and Appellees are privies in estate and are bound by the decree quieting title.

Greenleaf on Evidence Vol. 1 Sections 189, 536, 523.
Bigelow on Estoppel p. 88, 95.

Originally it was necessary to make the beneficiaries parties to all proceedings affecting their interest, and this rule still prevails where there is any doubt of the power of the Trustees to represent the beneficiary and bind him both in what is done

for him and what is done against him. The beneficiaries are the persons materially interested and can best represent their interest. Therefore, they ought to be parties in all cases unless there is a Trustee fully empowered to represent them, when the Court, in its discretion, may proceed without them.

Freeman on Judgments, Secs. 162. 157. 173.
Board of S. vs. Mineral Point R. R. Co., 24 Wis. 93. (126-128).
Shaw vs. R. R. Co., 5 Gray (Mass.), 170.
Willink vs. The Morris Canal & Banking Co., 4 N. J. Equity 397.
Van Vechten vs. Sebring, 2 John. Chan. (N. Y.) 197.
Vitterlein vs. Barnes, 124 U. S. 169.
Kerrison, Assignee, vs. Stewart, 93 U. S. 155.

It follows, we think, from the relation which the Trustee sustains to the beneficiary, that of a mere representative of him, that the non-appointment of the Trustee can not operate to suspend either the institution or prosecution of legal proceedings against the trust estate, or to discharge either the trust estate or the beneficiaries from the effect of the judgment rendered, when the latter have been made parties and served with legal process.

STATUTE OF LIMITATIONS.

The Statute of Limitations applies between *Cestuis que Trust* and third persons, the same as between Trustees and third persons.
Daniel's Chancery Pleading & Practice (5th Ed.) 644.
Angell on Limitations, Sec. 473.

The contention of Appellees, that the Statute did not begin to run until there was a representative chosen to prosecute and defend suits against the Grant, is not sustained by reason or authority. Unless persons are under the disabilities expressly mentioned in the statute, they cannot be exempted from its operation by judicial construction.

Angell on Limitations, Chap. 36, p. 475.
Tyler on Ejectment & Adverse Enjoyment, p. 928.

"It is now a settled doctrine, which has been repeatedly announced and applied by the Supreme Court of the United States, that however strong the reasons may be, the Courts cannot ingraft on a Statute of Limitations an exception not made in it; nor declare a right not to be barred, if within the fair

meaning of the language of the Act of Limitations, because it seems that the Legislature would have excepted it, if it had been anticipated and considered."

The Sam Slick, Fed. Case 12,282.
Clementson vs Williams 12 U. S. 25.
Bank of State of Alabama, vs Dalton, 50 U. S. 522.
Mc Iver vs Ragan, 15 U. S. 25.

Our Statute of Limitations in force at the time the suit of Appellants to quiet title was brought, is as follows:

"Art. 2938. No person or persons, nor their children or heirs shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within ten years next after the title or cause of action or suits accrued or fallen, and at no time after the ten years have passed: Provided, That if any person or persons that is or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be, at the time of said right or title first accrued, come or fallen within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the limits of the United States and the Territories thereof, that then such person or persons, his, her or their children, heirs or assigns, shall and may, notwithstanding the said ten years be expired, bring his or her suit or action, as he, she or they might have done before the passage of this act, so as such person or persons, his, her or their children, heirs or assigns, shall within three years next after his, her or their full age, discoverture, coming of sound mind, enlargement out of prison, coming to the United States or the territories thereof, or death take benefit of and commence such suit, at no time after the said three years: Provided, also, that in the construction of this saving exception, no cumulative disability shall prevent this bar, but shall only apply to that or those disabilities which existed at the time when the right to sue first accrued, and to no other. Provided, further, that such action so commenced shall be an action prosecuted with effect, and no other."

DATE AT WHICH STATUTE BEGAN TO RUN.

According to the common Law doctrine, the fee of an estate can never be in abeyance. It must at all times rest in some one *in esse*.

Mayo vs Wood, 50 Cal. 171.

When the title to the Grant left the Government it passed directly to its beneficiaries, and we maintain that the Act of Congress of June 21, 1860, operated *Proprio vigore* to pass such title. The language of the Act is, "Be and the same is hereby confirmed." This language in the confirming Act, is held to operate as a complete divestiture of the title of the United States from the date of its enactment. See Tameling vs. U. S. Freehold, etc., Co., 93 U. S. 644. Where this language of the Act of June 21, 1860, is so construed. Also,

Deseret Salt Co. vs. Tarpey, 142 U. S. 241 (247).
Schulenberg vs. Harriman, 21 Wall. 44. (60).
Leavenworth, etc., R. R. Co., vs. U. S. 92 U. S. 733. (741)
U. S. vs. Montana Lumber Co., 196 U. S. 573. (577).
Glasgow et al. vs. Hortiz et al. 1 Black (U. S.) 599. (601)
Grignon's Lessee, vs. Astor, 2 How. 319. (344).

The title passes by the words of Grant contained in the Act of Congress, and not by the patent subsequently issued thereon. When the legal title to the land is granted by Act of Congress, the title of the Government is as effectively divested as it would be by the issuance of a patent therefor by the Executive Department, under authority of law, and such land then becomes subject to the Limitation Laws of the State in which it is situated, and an adverse possession thereof after the date of such Grant for the requisite period fixed by such laws, will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor in pursuance of such Act of Congress.

Jatunn vs. Smith et al., 30 Pac. 200. Langdeau vs. Hanes, 21 Wall 521. Longlois vs. Crawford, 59 Mo. 456. Peting vs. DeLove, 71, Mo. 1., Ryan vs. Carter, 93 U. S. 78., Joplin vs. Chachere, 192 U. S. 94, Toltec Ranch Co,. vs. Cork, 191 U. S. 532. Montgomery vs. Bevens, Fed. Case 9,735. (p. 640), So. Pac. R. Co. vs. Whitaker, 41 Pac. 1083.

And a contest in the United States Land Department as to the property will not stop the running of the Statute of Limitations of the State. Southern Pac. R. Co. vs. Whitaker 41 Pac. 1083 (1085).

EXCEPTIONS.

The exceptions to this uniform rule of construction of Acts of Confirmation of Congress are thus stated in the decisions of this Court from which we quote.

"A Legislative Confirmation of a claim to land is a recogni-

tion of the validity of such claim, and operates as effectually as a Grant or quit-claim from the Government. If the claim be to land with defined boundaries or capable of identification, the Legislative confirmation perfects the title to the particular tract and a subsequent patent is only documentary evidence of that title. If the claim be to quantity and not to a specific tract capable of identification, a segregation by survey will be required and the confirmation will then immediately attach the title to the land segregated."

Langdeau vs. Hanes, 21 Wall 521 (530), Morrow vs. Whitney, 95 U. S. 551 (554), Guitard et al. vs. Stoddard, 16 How, 494 (512).

"The Law is settled that where there is a specific tract of land confirmed according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment. But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the land of others, then it is not open to controversy, that the title attaches to no land; nor has a Court of Justice any authority in Law to ascertain and establish its boundaries, this being reserved to the Executive Department." Stanford vs. Taylor, 18 How. 409 (412), West vs. Cochran, 17 How. 402 (515).

"Whatever interests the United States possessed in the lands was covered by those terms" (Refering to the language, There be and is hereby granted). "Unless they were qualified by subsequent provisions."

Deseret Salt Co. vs. Tarpey, 142 U. S. 241. (248). Whitney vs. Morrow, 112 U. S. 693.

"Generally speaking, while the legal title remains in the United States, the Grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the Government. Sometimes a certification of a list of lands to the Grantee is declared to be operative to transfer such title; but whenever the granting Act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, and while so remaining the Grant is in process of administration, and the jurisdiction of the Land Department is not lost."

Mich. Land & Lumber Co. vs. Rust, 168 U. S. 589 (592).

None of these exceptions apply to the case of the Las Vegas Grant, which was a specific tract capable of identification. Likewise no condition that the Grant shall be surveyed is coupled with this judgment of confirmation, nor are there any reservations or subsequent clauses restricting or qualifying its terms or making specific provisions for the issuance of a patent.

If however, a survey might be deemed to have been necessary, the "Pelham Survey" fulfills such requirements. The Baca Claimants were to have an area equal to that of the Town to be selected in five separate bodies. Hence knowledge of the exact area confirmed to the Town was necessary before the Surveyor General could provide them with the requisite certificate of their right and the area they were to select. The Pelham Survey of 1861 furnished this and its approval by "The proper officers of the Government" (Trans. p. 10) was also an approval of the area of the Las Vegas Grant as well as its boundaries, as determined by that survey. As was held by this Court in Shaw vs. Kellogg. 170 U. S. 312, this action taken by the Land Department was a finality as to the Baca Heirs. If so, it was a finality as to the area of the Las Vegas Grant for the one could no more be changed than the other.

At the latest then, the Land Department lost jurisdiction of the Las Vegas Grant June 21, 1863, when all the Baca floats were either located or barred of location, and the title of the Government then vested in the inhabitants of the Town, so that the Statute of Limitations of the Territory began to run.

The fact that in 1889 and 1900 the Commissioner of the General Land Office of the United States caused a re-survey of the Grant to be made by which its area was reduced from 496,446.96 acres to 431,653.65 acres, upon which patent issued, signifies nothing, since such re-survey was made and accepted without contest.

In conclusion we call the Court's attention to another view of the Act of the Legislative Assembly of New Mexico of March 12, 1903. (Finding of Fact 9. Trans. p. 107). It will be noted that in addition to ratifying the appointment of Trustees by the District Court, it likewise declares the policy of the Territory as to the Administration of the Grant, and in keeping with the purpose of the Mexican Government recognizes the occupation and settlement of the lands as the chief object to be accomplished, by avowing its intention not to interfere with or prejudice vested rights and enjoining upon the Trustees the express duty of giving "deeds of conveyance to any and all persons who hold a title to any such lands, which became or was perfect or entitled them to the possession thereof at the time of the acquisition of New Mexico, or at any time subsequent thereto."

No narrow or technical policy in dealing with settlers is here authorized. That rights of property could originate and become perfect and, if not, at least of such a character as would entitle the settler to the possession of his land, in the interim

between the confirmation of the Grant and the appointment of Trustees, is conceded, and all such titles, including the bare right to possession, the Trustees are commanded to approve and make valid by the execution and delivery of a deed.

If Appellees, as Trustees of the Grant, were required to give deeds of conveyance to parties merely entitled to possession, without "Judicial determination or adjustment" as this language of the Act imports, they certainly could have no grounds for refusal to do so in a case where such possession had been adjudicated to have been for the statutory period, as here.

We submit therefore from the foregoing considerat ons that this case should be reversed and remanded with instructions to award a writ of mandamus in accordance with the petition of Appellants.

Respectfully submitted,
JOHN D. W. VEEDER,
Counsel for Appellants.

APPELLANTS' REPLY BRIEF.

Appellees entire argument assumes that the decree of 1894 is open to attack here. They ignore the fact that this is a collateral proceeding and the decree therefore conclusive as to them.

Appellants stand upon the decree of 1894 and maintain that not only possession for the statutory period, but every other fact necessary to support that decree was adjudicated in that case and such adjudication is binding here.

Appellees would have us believe there are three issues here. 1st. that of the sufficiency of the service upon the Town of Las Vegas in the suit to quiet title. 2nd. That of the running of the Statute of Limitations. 3rd. That of the non-suability of the Town, until furnished with officers, because of its being a Trustee of a public and political trust.

The first we have shown in our brief page 10 is positively excluded by the language of paragraph 22, and the Supreme Court of New Mexico, in considering it, both disregarded the pleadings in the case and contradicted admitted facts.

The third is nowhere hinted at in the pleadings. It is purely a creature of Appellees imagination.

The second, as we have shown in our brief page 9 is the only issue made by the pleadings in the case. The answer from paragraph 4 to 23 avers the facts in support of this issue while paragraph 23 merely states the consequence resulting

from the preceding averments as to the condition of both title and Town. We have read paragraphs 22 and 23 (Trans. p. 13.) separately and together and interpreted them so as to make them consistent with each other, and find they have reference to the same issue. Say what Appellees may upon this point, they are confronted with this dilemma; either their pleadings (answer and counter-claim Trans. p. 9 53) contain averments consistent with each other and raise but one issue, or averments inconsistent with each other and raise two, inconsistent isssues. By insisting, as they are now doing, that the Town of Las Vegas could have been served with legal process in 1894, in the face of their sworn declaration that it could not have been so served, Appellees are blowing hot and cold in the same breath.

Appellees make frequent references to the Town of Las Vegas as a "known owner and claimant" of the Grant, but nowhere attempt to show how it could have been so. They ask us to take the bare assertion as proof of the fact. Under Sec. 4011, known claimants are any and all persons, living at the time suit is brought and known, as one seen and conversed with, whom plaintiff is informed and believes claims adverse to him. Applied to artificial persons, it would read any and all legal entities in existence at the time suit is brought and known as one knows a corporation through its office and the transaction of business, which plaintiff is informed and believes claim adverse to him In addition it must be such a legal entity as can be served with legal process in some one of the various ways provided by law. If this be a correct definition of a known claimant in the sense in which the words are used in our Statute Finding of Fact 3. Trans. p. 100.) could any one in 1894 have made an affidavit that the Town of Las Vegas was then a known claimant adverse to plaintiff, conceding that the status of the Town at the time was such as appellees swear it was in finding of fact. 5. (Trans. p. 103).? We think not.

We should add, that the Supreme Court of New Mexico was in error, in finding that the Town of Las Vegas could have been served in 1894 as a defendant "so situated that process could not otherwise be served upon it." The Statute (Finding of Fact 4. Trans. p. 103.) providing for such service contemplates its use against living defendants only.

If there were any important facts to be found by the lower Court, other than were found, Appelleees were before that Court and could have obtained them. As to what Appellees call the essential fact, viz; knowledge by Appellants in 1894 that the Town was a known claimant, there was no testimony in the record below that strengthened the admitted averments on that subject, and the Supreme Court in its opinion states all the facts upon which that finding was based.

Our Statute on the subject of quieting title to real property (Finding of Fact 3. Trans. p. 100) has never been construed by our Supreme Court, as Appellees say. This is the first case in which, so far as we know, it was ever before that Court and coming up in a collateral proceeding was not open to construction, had it been in issue. The case of Rodriguez vs. La Cueva Ranch Co., was a partition proceeding under an entirely different statute and therefore far from being a construction of the Statute we are considering.

Appellants in their brief have asked Appellees, what would have been gained by adopting their mode of service in preference to the one employed. With this inquiry before them, they answer as follows: "The sole question for determination here is as to whether or not the Town was a party, not as to whether the inclusion of its name among the defendants would have resulted in an appearance on its behalf."

To remove all doubt as to the intention of Appellants to quiet title against the Grant and the Court's knowledge of such intention, we refer to Appellants complaint. (Finding of Fact 2. Trans p. 97.)

Appellees in the concluding paragraph of their brief seem skeptical about the position they have taken and discussed. They say, "If it could have been sued at all, service could have probably been made by publication under Sec. 2694 C. L. 1897, which was then in force." If, on the contrary, it could not have been sued, it follows, that there was no one but the inhabitants of the Town to be brought before the Court, and the method Appellants employed was the only one.

Respectfully submitted,
JOHN D. W. VEEDER,
Counsel for Appellants.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 218

GEORGE E. PRIEST, MELVIN W. QUICK AND CHARLES M. BENJAMIN,
Appellants.

vs.

THE BOARD OF TRUSTEES OF THE TOWN OF LAS VEGAS, IN THE COUNTY OF SAN MIGUEL, NEW MEXICO,
Appellee.

Appeal from the Supreme Court of New Mexico

BRIEF OF APPELLEE

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IN THE

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THE BOARD OF TRUSTEES OF THE TOWN OF LAS VEGAS, IN THE COUNTY OF SAN MIGUEL, NEW MEXICO,
Appellee.

No. 218

STATEMENT

This case involves the title to a tract of land lying near the Town of Las Vegas, New Mexico, and within the boundaries of the Las Vegas Grant. Appellee claims title as the representative of the Town of Las Vegas, the owner of the grant by virtue of the Act of Congress of June 21, 1860, confirming it (transcript p. 10), and the patent of the United States issued to the town in conformity with that confirmation (transcript p. 12). A history of the grant will be found in the opinion of this court in *Maese* v. *Herman,* 183 U. S. 572, as well as in the exhibits attached to the answer of appellee in this case. (Transcript p. 9).

Appellants claim title to the tract in question by virtue of a decree of the District Court of San Miguel County, New Mexico, rendered September 15, 1894, which in terms quieted title in appellants, plaintiffs in that proceeding, as against the defendants therein, on the ground of adverse possession. There is in the record no proof of adverse possession, nor of title in appellants, other than this decree. Appellants' entire claim is based upon this decree, and the present proceeding was instituted solely to compel appellee to recognize it as binding and to execute to appellants a deed for the land covered by the decree. Obviously, therefore, the only question for discussion before this court is whether or not the decree of 1894 is binding upon appellee. If binding, then it may be conceded that appellants are entitled to their relief. If not binding, they are entitled to nothing for they do not claim title from any other source. Both the District Court of San Miguel County and the Supreme Court of New Mexico held the decree not binding upon appellee, and denied appellants the relief demanded.

The answer filed by appellee in the District Court (transcript p. 9) sets out a complete history of the Las Vegas Grant. The Mexican proceedings, the confirmation by Congress, the various surveys, the conflicting decisions upon its extent made by various officials of the Interior Department, the litigation over the question of the name in which the patent should issue, and the final patent, are all shown. Based upon these proceedings and upon certain other proofs not disclosed by the present record, it was the contention of appellee in the lower courts that the decree of 1894 was not effective to bind the Town of Las Vegas, first, because it was not a party to the suit in which that decree was rendered, not being a party by name and not being included in the class of

defendants designated as "unknown claimants of interests," inasmuch as it was a known, not an unknown, claimant; and, secondly, because the Town of Las Vegas was not bound by that decree, even if properly made a party, since title did not finally pass from the United States until the patent of 1903, or at least until the approval of the final survey of 1900; and, thirdly, because of the peculiar nature of the title of the town, holding as trustee of a trust, of a public and political nature, it was not suable until such time as it was furnished with officers by whom that trust could be carried out, and authorized to sue and be sued, which happened for the first time in 1902 when its first trustees were appointed. The Supreme Court of New Mexico decided the case upon the first of the grounds above stated, namely, that the Town of Las Vegas was not a party to the suit of 1894. We shall therefore not discuss the other grounds.

We also decline to enter into any discussion of whether or not title to land on the Las Vegas Grant can be acquired as against the Town of Las Vegas by adverse possession, or as to the date when the statute of limitations based upon such possession commences to run. These questions are argued in appellants' brief commencing on page 13, but have no place in this case. Outside of the finding contained in the decree of 1894 there is no evidence of any adverse possession by appellants, so that if the decree is not binding the question of possession is eliminated. If the decree is binding, then it is immaterial whether it was based upon proof of adverse possession or of title acquired in some other way.

The statement of facts by the lower court, hereafter referred to, is wholly silent on the subject of adverse possession by appellants.

Our discussion will be confined entirely to the ques-

tion of whether or not the Town of Las Vegas was a party to the decree of 1894.

Statement of facts as to proceeding of 1894.

The bill of complaint and other pleadings on which the decree of 1894 was based appear in the transcript commencing at page 58. The plaintiffs in that case were the same persons appearing as appellants here. The Town of Las Vegas does not appear as a defendant by name. A number of persons are named as defendants, but we are concerned with none of them since there is no privity between any one of them and the Town of Las Vegas. In addition to the named defendants, there is the designation of a class of persons as defendants under the style of "all the unknown claimants of interests in the premises and lands hereinafter described adverse to your orators," and it is this designation which is claimed to embrace the Town of Las Vegas and make the town a party defendant in that suit.

The allegation of the bill of complaint in regard to to the defendants so designated is as follows (transcript pp. 60, 99.):

"That your orators are credibly informed and believe that certain unknown persons, designated in this bill as 'Unknown Claimants of interest in the premises adverse to your orators' also make some claim of interest and title in and to the said tract of land adverse to the estate of your orators, but what the nature and extent of the said claim of said unknown persons in and to the said tract of land is likewise to your orators unknown."

Service upon the defendants designated as "unknown claimants" was made by publication. The affidavit on

which the publication was based was made by John D. W. Veeder as attorney for complainants, and so far as applicable here was as follows (transcript pp. 62, 101.):

"and that the place of residence is unknown and the whereabouts cannot be discovered of any and all of the defendants designated as Unknown Claimants of Interests in the Premises and Lands described in the Bill of Complaint, who claim adversely to the complainants, George E. Priest, Melvin W. Quick and Charles M. Benjamin."

No service of any kind was made or attempted upon the Town of Las Vegas or any representative or inhabitant of the town, unless, as is now claimed by appellants, the publication above mentioned was effective process against it.

The statute allowing the designation of defendants as "unknown claimants of interests" is in part as follows (transcript p. 100):

Any or all persons whom the plaintiff alleges in his bill of complaint, he is informed and believes make claim adverse to the estate of the plaintiff, the unknown heirs of any deceased person whom plaintiff alleges in his bill of complaint in his life time made claim adverse to the estate of plaintiff, and all unknown persons who may claim any interest or title adverse to plaintiff, may be made parties defendants to said bill of complaint by their names, as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased person, and said unknown persons who may claim any interest or title adverse to plaintiff by the name and style of unknown claimants of interests in the premises adverse to plaintiff, and the service of process on, and notice of said suit against defendants, shall be made in the same manner as now provided by law in other civil suits."

There is no proper statement of facts by the court below, and therefore nothing for review in this case.

A complete discussion of the issues in the present case is somewhat hampered by the lack of a proper statement of facts from the Supreme Court of New Mexico. This appeal is governed by the act of April 7, 1874, 4 Fed Stat. Ann. 460, providing that on appeal from a Territorial Court "a statement of the facts of the case in the nature of a special verdict" shall be made and certified by the court below. There is a so-called "Findings of Facts" in the record, commencing on page 96, but an inspection of it shows that it is merely a recital of certain admitted allegations of the pleadings, conclusions of law, and copies of the pleadings themselves. On page 88 of the transcript appears an order of Judge McFie settling a bill of exceptions and which was originally appended to the bill of exceptions made a part of the record in the court below and containing all the evidence and exhibits used in the District Court. That bill of exceptions is, of course, not before this court, nor is there any statement of facts by the Supreme Court to take its place. Taking up these findings one by one the following appears:

Finding No. 1 is, except for the acreage, paragraph No. 4, in plaintiff's complaint, (transcript p. 10) not denied by respondents.

Finding No. 2 is contained in paragraph No. 1 in respondent's counterclaim (transcript p. 53), admitted by plaintiffs (transcript p. 75).

Finding No. 3 is a statement of law, not fact.

Findings No. 4 and 5 are covered by paragraph 1

of respondent's counterclaim (transcript pp. 53, 62) admitted by plaintiff (transcript p. 75).

Finding No. 6 is alleged in plaintiffs' complaint (transcript p. 4) as well as in respondent's counterclaim (transcript p. 53).

Finding No. 7, if it be a finding of fact, is of no importance to the issues of this case, and appears by inference from the pleadings.

Finding No. 8 is substantially covered by paragraph 22 of respondent's answer (transcript p. 13), and paragraph 22 of the counterclaim (transcript p. 57), both admitted by plaintiff.

Finding No. 9 is a statement of law.

Finding No. 10 is alleged in plaintiffs' complaint (transcript p. 3) and admitted by respondent through failure to deny.

Findings No. 11 and 12 are only statements of the record in the case.

It will thus be seen that there is not a single finding bearing upon the issues here that is based upon the evidence heard by the District Court in this case and brought before the Supreme Court of the Territory by bill of exceptions, or that can be said to constitute a "statement of facts of the case in the nature of a special verdict." Except so far as they may be gleaned from the pleadings and from the opinion of the court, this court is wholly ignorant of the facts upon which the opinion of the lower courts was based.

Under these circumstances there is nothing for this court to examine, and the judgment should be affirmed.

Gray v. *Howe*, 108 U. S. 12.
Bonnifield v. *Price*, 154 U. S. 672.
Marshall v. *Burtis*, 172 U. S. 630.
Cohn v. *Daley*, 174 U. S. 539.
Armijo v. *Armijo*, 181 U. S. 561.

The claim of the Town of Las Vegas was known to appellants, and the town was a known claimant.

If, under the authorities above cited, this court will review the judgment of the Supreme Court of New Mexico at all, it will do so with the presumption of the existence of whatever facts were necessary to support that judgment. There is but one such essential fact, namely, that at the time of the commencement of the suit to quiet title in 1894, and of the decree here relied upon, plaintiffs in the case, appellants here, knew that the town of Las Vegas was a claimant of the title to the land in controversy, so that the town was in fact a known, not an unknown, claimant. Inasmuch as the judgment of the lower court is based upon that fact, and since the evidence is not before this court, it must be presumed here that the proof on this subject sustained the judgment. It is therefore out of place for appellants to attempt to argue lack of knowledge of this fact, or insufficiency of proof on the subject, as is done on pages 10 to 12 of their brief. The question is not an open one. If, however, this court desires to search the record for proof of the matter, sufficient may be found, even in the absence of the evidence or of any findings, to justify the judgment.

The bill of complaint in the suit to quiet title alleges

that the grant of which the land in controversy is a part "was on June 21, 1860, duly confirmed by Act of Congress of the United States to the Town of Las Vegas," this being a statement by appellants themselves that they knew of the claim of the town. (Transcript p. 59).

The Supreme Court of New Mexico in its opinion definitely states the knowledge of appellants in the following language (transcript p. 119):

"But in 1894, were the owners of the Las Vegas Grant, whom defendant now represents, unknown owners? The complainants certainly knew the exact status of the matter for their complaint, as we have seen, in terms alleged that the premises were a part of the Las Vegas grant 'on June 21, 1860 duly confirmed by Act of Congress of the United States to the Town of Las Vegas.'

The complainants thus knew that the Town of Las Vegas was the confirmee of the grant and that if complainants' title had, by adverse possession, been wrested from any one it was from such confirmee."

It is therefore established in this case that appellants knew of the claim of the Town of Las Vegas at the time of the bringing of the suit to quiet title. The fact that there may have been some uncertainty as to just what the town consisted of, or as to the meaning of the term Town of Las Vegas, or as to the individual beneficiaries, is immaterial. The discussion on page 11 of appellant's brief of the character of the Town of Las Vegas, its status, and of the probable effect of naming it as a defendant is also out of place.

The sole question for determination here is as to whether or not the town was a party, not as to whether the inclusion of its name among the defendants would have resulted in an appearance on its behalf.

The Town of Las Vegas was not made a party to the suit of 1894 by the designating as defendants of the "unknown claimants of interests adverse to complainants."

In the absence of the statute above quoted allowing the use of the designation "unknown claimants of interests," no such term could have been used, for the right to sue persons otherwise than by making them defendants under their proper names, or under some description adequate to identify them, is purely statutory. The question of who may be made parties under such a designation is answered by the statute itself. It provides that "all unknown persons" may be designated and proceeded against as such. It does not purport to allow such a designation for any "known" persons, but expressly provides that such persons must be made defendants "by their names, as near as the same can be ascertained." The express language of the statute requires the naming of known claimants, and it is difficult to understand how any other construction can be given to it. The Supreme Court of New Mexico in passing upon it says (transcript p. 119):

"Statutes providing for constructive service are subject to grave abuse. They are of course necessary, since without them titles could never be quieted or proceedings in rem maintained against non-resident or truly unknown parties. But it is a matter of judicial knowledge that a published summons in the vast majority of cases fails to reach those to whom addressed and that property is taken with but a theoretical opportunity for the hearing which is an essential of due process of law. Considerations such as these last named lead the courts to insist upon a strict construction of such statutes and

to hold that where the real owner may be brought into court by name his property may not be taken by an advertisement against unknown owners. Whereas, as in this case, the locus of the title is definitely declared of record and such is confessedly known to the complainant, it is but an exaction of good faith that the holder of such title should be summoned by name in order that it may appear and defend. To exact less is to open the doors wide to insidious attacks upon property rights, and indeed to ignore the statute which in terms provides (C. L. Sec. 4011) that persons claiming interests 'may be made parties defendant by their names, as near as the same can be ascertained.' "

Since the decision of this case by the Supreme Court of the Territory, the same question has been decided in the same way by the Supreme Court of the State of New Mexico in *Rodriguez* v. *La Cueva Ranch Co.*, 134 Pac. 228. The latter case involved the interpretation of Sec. 3181 of the compiled laws of New Mexico, governing the designation of unknown parties in partition proceedings, which reads as follows:

"Sec. 3181. All persons interested in the premises of which partition is sought to be made, whose names are unknown, may be made parties to such partition by the name and description of unknown owners or proprietors of the premises, or as unknown heirs of any person who may have been interested in the same."

In that case it appears that certain persons who were in the actual possession of parts of the premises sought to be partitioned had not been made parties to the action by name, and the question was as to whether they were parties under the designation of "unknown owners." In the present case, when before the Supreme Court of the Territory, it was found that plantiffs had actual knowl-

edge of the claim of respondent. In *Rodriguez* v. *La Cueva Ranch Co.*, the knowledge of plaintiffs was presumed from the possession of the defendants which is held equivalent to actual notice. The principle underlying the two cases is the same. The Supreme Court of the State follows the rule laid down by the Supreme Court of the Territory, saying:

"It is apparent from a reading of the foregoing sections, it seems to us, that it was not the intention of the Legislature to provide for the making of parties by the name of unknown owners, and for the service of process upon them by publication, when they in fact were in the open and notorious adverse possession of a part of the premises. The test seems to be pointed out in section 3180, that there must be some impediment so that the parties cannot be named before resort may be had to a procedure so well known to be ineffective to bring home notice to interested parties. In the partition proceeding, the plaintiffs and defendants named were claiming to be the owners of the property and to have title to the same. They had the means, as indeed we believe it was their duty, to ascertain the names of all persons actually holding adverse possession of any of the property claimed which was the subject-matter of the litigation. And so we conclude that it was not the intention of the Legislature to allow the rights of claimants to land, situated as the appellees and their predecessors in title were, to be foreclosed of their rights by a proceeding in which they are not named, and in which the only service obtained upon them was by publication."

Both the Territorial and State Courts have so construed these statutes as to prevent the inclusion of persons whose names are known under the designation of unknown claimants. These are local statutes, and it is elementary that the construction given them by a state court will be followed by this court. In the absence of

manifest error this court will also follow the decision of a Territorial Court in such matters.

Albright v. *Sandoval*, 216 U. S. 331.
Board of Commissioners v. *Coler*, 215 U. S. 296.
English v. *Arizona*, 214 U. S. 359.
Lewis v. *Herrera*,, 208 U. S. 309.
Crary v. *Dye*, 208 U. S. 515.

The construction given this statute by the lower court, should therefore be followed.

Discussions of the general question of the right to make parties defendants under the description of "unknown claimants" are found in the decisions construing the statute of California that provided for the perfection of title to real estate where the public records had been destroyed by the San Francisco earthquake. That statute provided that the defendants should be designated as "all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof," and allowed service by publication, requiring also personal service upon named persons residing in the state. The Supreme Court of California in *Title & Document Restoration Co.* v. *Kerrigan*, 150 Cal. 289, construed this statute as requiring the plaintiff "to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants," and thus construed holds the law constitutional. With reference to "unknown claimants" the court says:

"And in this connection it may be well to notice the contention of respondents, that, by the terms of the act now under consideration, the plaintiff in the proposed action may include among 'unknown claimants' those who, with reasonable diligence on his part, might have become known to him. It is no doubt true that so far

as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in the cases which sustain the power to bind 'unknown owners' by substituted service in actions of the character now under consideration."

The same statute is construed in the same way by this court in *American Land Co.* v. *Zeiss,* 219 U. S. 47.

In addition to the case of *Ware* v. *Easton,* 46 Minn. 180, relied upon and quoted from in the court below (transcript p. 119) numerous courts have laid down the general rule that artificial designations of defendants may be used only in case of necessity, and that persons whose names are in fact known, or could with reasonable diligence be ascertained, may not be included.

The case of *Galbreath* v. *Teufel,* 107 N. W. 48, was a suit to quiet title in which service was made by publication as to unknown claimants. In discussing the effect of the decree so obtained on persons whose names and addresses might have been ascertained the court said:

"It is plainly evident that if the agent did not in fact know the names and addresses of the heirs it was because he did not take the trouble to inquire. He knew where the information could be had, and it was easily accessible. * * * * * It is too plain for argument that the proceedings resulting in this judgment were a gross abuse of judicial process even if it be conceded that they were in form due process of law. * * * * To permit a judgment based on such procedure to stand would be a reproach on the administration of justice. * * * * * Whether any actual deceit was intended

or not the effect of the procedure followed was a *fraud on the court* as well as upon the defendants."

A similar case is *Floto* v. *Floto*, 213 Ill. 436, 72 N. E. 1902, a proceeding for the probate of a will in which service by publication was had on "unknown heirs." The court says:

"Here were heirs that were known and could not be placed in the designation of unknown heirs. Their whereabouts was known. They were entitled by statute to have notice of this probate. They did not have it and the court did not have jurisdiction to enter probate without it."

The following cases, several of which are cited by the Supreme Court of New Mexico in *Rodriguez* v. *La Cueva Ranch Company*, lay down the same general rule:

Bear Lake Co. v. *Budge*, 9 Idaho 703, 75 Pac. 614.
Hill v. *Henry*, 66 N. J. Eq. 150.
Town of Hancock v. *First National Bank*, 93 N. Y. 8.
Bardwell v. *Collins*, 44 Minn. 97, 9 L. R. A. 152.
Shepard v. *Ware*, 46 Minn. 174.
Eayers v. *Nason, et al.*, 74 N. W. 408.
Balse v. *Kaulter*, 75 N. W. 566.
W. A. Wood Co. v. *Dobry*, 59 Neb. 590, 81 N. W. 611.
Topliff v. *Richardson*, 107 N. W. 114, 76 Neb. 114.
Bunker v. *Taylor*, 13 S. D. 433, 83 N. W. 555.
Oziah v. *Howard*, 128 N. W. 364.

Assuming for the purpose of argument that the Town of Las Vegas could have been sued, it is apparent that it was not a party to the suit of 1894. It is not named, and being a known claimant is not embraced in the class of unknown claimants. If it could have been

sued at all, service could probably have been made by publication under section 2964 C. L. 1897 which was then in force, by making the affidavit required by that section that the defendant was so situated that process could not be otherwise served upon it, and naming the town in the complaint, affidavit and publication. But certainly the proceeding of 1894 was ineffectual to bind the town, which was not made a party, and it may be doubted if it was intended to affect it.

The only question before the Supreme Court of New Mexico was as to the effect of the degree of 1894, and this having been correctly decided the judgment of that court should be affairmed.

Respectfully submitted,

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